

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
IN RE: 2703(d) ORDER; : :
10GJ3793 : Case No. 1:11-dm-3
-----: :

HEARING ON MOTIONS

February 15, 2011

Before: Theresa C. Buchanan, Mag. Judge

APPEARANCES:

John S. Davis, Andrew S. Peterson and Tracy D. McCormick,
Counsel for the United States

John W. Keker and John K. Zwerling,
Counsel for Defendant Appelbaum

John D. Cline and Nina J. Ginsberg,
Counsel for Defendant Gonggrijp

Cindy A. Cohn, Aden J. Fine and Rebecca K. Glenberg,
Counsel for Defendant Jonsdottir

William B. Cummings, Counsel for Inter-Parliamentary Union

1 NOTE: The case is called to be heard at 10:30 a.m.
2 as follows.

3 THE CLERK: The United States of America versus
4 Jacob Appelbaum, et al., case number 11-dm-3. Will counsel
5 please note their name for the record.

6 THE COURT: Good morning.

7 MR. DAVIS: Good morning, Your Honor. John Davis
8 for the Government. With me at counsel table is Andrew
9 Peterson and Tracy McCormick, we are all Assistant United
10 States Attorneys.

11 THE COURT: All right. Good morning.

12 MR. ZWERLING: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. ZWERLING: John Zwerling for Mr. Appelbaum. I
15 would like to introduce John Keker, who has been admitted pro
16 hac vice. I would like to introduce him to the Court, he is
17 from San Francisco.

18 THE COURT: All right. Good morning. Nice to meet
19 you.

20 MR. KEKER: Good morning, Your Honor.

21 THE COURT: Good morning, Ms. Ginsberg.

22 MS. GINSBERG: Good morning, Your Honor. Nina
23 Ginsberg on behalf of Mr. Gonggrijp. And I have with me John
24 Cline, who has been admitted pro hac vice.

25 THE COURT: All right.

1 MS. GINSBERG: He is also from San Francisco.

2 THE COURT: Good morning.

3 MR. CLINE: Good morning.

4 MS. GINSBERG: Thank you.

5 THE COURT: All right. This comes on the
6 defendants' two motions. And who is arguing these on behalf
7 of the defendants, Mr. Kecker? Excuse me, the petitioners
8 rather.

9 MS. GLENBERG: Your Honor, I am sorry, we have more
10 attorneys to introduce.

11 THE COURT: Oh, I'm sorry.

12 MS. GLENBERG: I'm Rebecca Glenberg, local counsel
13 for Birgitta Jonsdottir. And with me are Aden Fine and Cindy
14 Cohn, admitted pro hac vice.

15 THE COURT: All right. Good morning. Is there
16 anyone else?

17 MR. CUMMINGS: One more, Your Honor.

18 THE COURT: I see. How are you?

19 MR. CUMMINGS: William Cummings on behalf of
20 Inter-Parliamentary Union, Your Honor. We filed a motion for
21 amicus.

22 THE COURT: Yes. And I granted that. Did you want
23 to argue today too?

24 MR. CUMMINGS: We wanted the amicus to be approved,
25 that's all, Your Honor.

1 THE COURT: I have done that.

2 MR. CUMMINGS: Oh, good. Thank you.

3 THE COURT: Okay, thank you. So, this is on the
4 petitioners' two motions. Who is going to argue these?

5 MR. KEKER: Your Honor, there are several motions.
6 I am John Keker representing Mr. Appelbaum.

7 THE COURT: Good morning.

8 MR. KEKER: I was going to argue the motion to
9 vacate. Ms. Cohn is going to argue the motions to unseal
10 that, to the extent that they need to be argued, the ones that
11 are not substantive.

12 And Mr. Fine is arguing the substantive motion to
13 unseal, namely the application that led to the December 14
14 order.

15 THE COURT: Okay. I wasn't really planning to have
16 much argument on the motion to unseal the documents. I just
17 needed the positions of both parties. And I understand there
18 are a couple extra documents that I need the position of the
19 defendant-- the Government on. But I don't think those are
20 really controversial. That's just something I have to pick
21 through.

22 So, did you want to go ahead and argue the first
23 motion?

24 MR. KEKER: Yes, ma'am, I would like to. I would
25 like to.

1 And as I said, I represent, along with Mr. Zwerling
2 and Mr. Sears, Jacob Appelbaum, who is an American citizen. I
3 am arguing the motion to vacate. And I have been asked by the
4 other two movants to make an argument that really affects all
5 three of us.

6 THE COURT: Okay.

7 MR. KEKER: So, if they need to supplement it, they
8 will, but we're not going to, we're not going to triple-team
9 it.

10 THE COURT: All right, thank you.

11 MR. KEKER: And I'm sure you wouldn't let us.

12 THE COURT: No, I wouldn't. We are known as the
13 Rocket Docket, as you know.

14 MR. KEKER: We guessed, we guessed, Your Honor.

15 The motion to vacate is directed to the December 14,
16 2010 order that the Government obtained ex parte. There has
17 been some discussion in the briefs about a limitation that
18 Twitter and the Government have worked out, but as far as we
19 know and based on our discussions with the Government they
20 have not promised or otherwise officially limited that order.

21 So, my remarks are being directed to the order that
22 was issued by this Court on December 14, 2010 and which we saw
23 after it was unsealed in January of this year.

24 In that order, as the Court knows, the Government
25 demands information about all the connections via Twitter that

1 certain named individuals made, who sent, who received, where
2 they were. I will talk more about that. When they were sent,
3 the IP addresses. Basically a map of the association of the
4 people who are bringing this motion.

5 And it is indeed ironic that we're making this
6 argument today given the events recently in Egypt and Tunisia,
7 this whole idea of the political use of social networking
8 mechanisms like Twitter has been, as I know the Court is
9 aware, very much in the news. And it goes to the essence of
10 what we're concerned about here.

11 They applied for an order under 18 U.S.C. 2703(d),
12 the Stored Communication Act. That requires, as we said very
13 strongly in our papers, that requires a very specific
14 statement of articulable facts showing that what they are
15 asking for is relevant and material to an ongoing criminal
16 investigation.

17 Needless to say, we haven't seen the application
18 that accompanied that order. You have. It makes it a little
19 awkward for me to be standing in front of you saying whatever
20 is in that application does not support the order that was
21 given, but I take solace in the fact that you recognized that
22 the order was presented to you ex parte. We didn't have a
23 chance to make any of the arguments that were, that were
24 before you. And I doubt very much that the Government brought
25 some of the arguments that we're bringing before you when the

1 order was presented.

2 So, let me jump in. I mean, the first--

3 THE COURT: And you can be assured I have read
4 everything. So, you can just address what you think needs to
5 be highlighted or added to.

6 MR. KEKER: Okay. Well, there is enough back and
7 forth and intermeshing of arguments that I just wanted to make
8 sure that our position was very, very clear.

9 THE COURT: Sure.

10 MR. KEKER: The first and foremost reason to vacate
11 this order is statutory. And that is, whatever the showing
12 they made, whatever is in those papers, they couldn't justify
13 an order as broad as the one that they obtained on
14 December 14.

15 Mr. Appelbaum, I will use as an example our client,
16 he is a major tweeter. He at the time of these papers had
17 more than 9,000 tweets. He had 10,000 followers. He talked
18 about all kinds of political matters on them. Some of them
19 having to do with Wikileaks, but a lot of them having nothing
20 to do with Wikileaks.

21 The order asked for the IP addresses that would
22 allow the Government to figure out who Mr., where Mr.
23 Appelbaum was at all times, was he at home, was on the road,
24 was he at his office, for a one-year period. Later they
25 narrowed it to a six-and-a-half month period. But still, it's

1 a huge amount of information that is not public.

2 There is no possible justification that they could
3 have put in that application to support getting all of his IP
4 addresses every time he published something of a political or
5 personal nature. And there is no possible justification for
6 learning his location every time he sent a tweet no matter
7 what the application says.

8 So, the first--

9 THE COURT: What do you mean no matter what the
10 application says?

11 MR. KEKER: Well, it can't possibly-- I guess what
12 we're saying is, the application, I can just imagine-- I
13 mean, it has something to do with Wikileaks. It has something
14 to do with these are people who know the Wikileaks founder.
15 The Government is interested in seeing what the connections
16 are between these people and the Wikileaks founder. All of
17 that I can imagine.

18 What I can't imagine is how that leads to an order
19 as broad as the one they asked you for. That's really our
20 point.

21 THE COURT: Okay.

22 MR. KEKER: I can't-- And I guess, let me back up
23 and say, if you grant, Mr. Fine will be arguing this, but
24 we've asked that the application be unsealed and we've asked
25 once it's unsealed for an opportunity to take a look at it

1 just as though it were a search warrant affidavit and raise
2 any issues that we see and get much more specific than we're
3 able to do now.

4 What I'm here to say though is because of the
5 breadth of the order, it can't, and whether or not there is a
6 core of the showing that they made that would justify some
7 order from this Court, it wouldn't justify an order as broad
8 as the one they asked for.

9 And that leads me to the second reason. So, the
10 first reason is statutory. And we're asking you to exercise
11 your discretion to vacate the order.

12 The second reason is constitutional. And that is
13 the doctrine of constitutional avoidance. If there is a
14 constitutional issue here that would have to be dealt with in
15 order to uphold this order, if it can be avoided by some
16 lesser means than getting to the constitutional issues under
17 the First and Fourth Amendment, it should be.

18 And that's what the Third Circuit opinion to some
19 extent was about that we've cited. There the magistrate set
20 aside, and they sent it back to the magistrate for a further
21 factual showing, that set aside a 2703(d) order because the
22 magistrate thought that the Government should have gotten the
23 search warrant.

24 The Third Circuit said, well, we don't agree with
25 your reasoning, but there has got to be a lot more work here

1 done in a factual way to decide whether or not this order
2 would violate the Fourth Amendment. And it's that that led
3 them to say the magistrate has discretion to say, no, I'm not
4 going to do this and to go ahead and require the Government to
5 get a warrant rather than have the hearing that would be
6 required under the Third Circuit opinion.

7 So, that's one thing that we're asking for, for you
8 to exercise your discretion that way.

9 Let me talk about the constitutional issues that
10 you would be avoiding if you did that. And I want to start
11 with the Fourth Amendment.

12 The order allows the Government to follow Mr.
13 Appelbaum and others electronically for an extended period of
14 time and learn when he is at his home, when he is at his
15 office, when he's traveling, but primarily when he is in
16 protected places, places protected by the public amendment to
17 find out what he is doing.

18 And when the Government can know what you're doing
19 in your home or in your office, can get information that it
20 couldn't get by visual surveillance, that is a search under
21 the Fourth Amendment. It's protected by the warrant
22 requirement, and probable cause is required to get a warrant.

23 The cases that we've cited, and I know you've read
24 and looked at in the briefs, include Karo, which dealt with a
25 beeper that ended up inside a house. And maybe most

1 importantly Kyllo, which was decided 15 years later. And
2 Justice Scalia made no uncertain-- I mean, Justice Scalia
3 said, when you find out what's happening inside somebody's
4 house, in that case it was somebody sitting outside trying to
5 figure out if heat lamps were on, when you find out--

6 THE COURT: Well, aren't you overstating it just a
7 little bit in terms of what this, what this order goes to in
8 terms of what information the Government would be seeking as
9 to these petitioners?

10 As I can see it, they're not asking what these
11 people are doing in their homes or other private places. They
12 are asking for location data primarily. Isn't that correct?
13 I think you're exaggerating this quite a bit.

14 MR. KEKER: I have been excused of exaggerating all
15 my life, Your Honor. And I'm sorry, I won't, I will try not
16 to do it.

17 No, but I don't think I'm exaggerating. They're
18 asking when tweets are being published, when certain political
19 speech is going out of the house, because that's public--

20 THE COURT: Right.

21 MR. KEKER: Where were-- Or not going out of the
22 house. Where were you when that happened? They're getting
23 location data that ties to messages.

24 THE COURT: That doesn't exactly tell them what a
25 person is doing otherwise in their house, does it?

1 MR. KEKER: Agreed. No, it doesn't.

2 THE COURT: Okay.

3 MR. KEKER: It doesn't. And both Karo and Kyllo
4 talk about that. Does it need to be intimate detail of what's
5 going on in the house. And the answer Justice Scalia tells us
6 is, no, it doesn't have to be intimate detail.

7 It can be information which coupled with inferences
8 allows you to gather information, gather evidence that is
9 useful to this ongoing criminal investigation.

10 The issue is, is it a search. And the answer from
11 those cases is, yes, it is a search. It doesn't have to be
12 particularly specific. Because that was one of the major
13 arguments that the Government made that, oh, it's just, Karo
14 was limited to intimate details, and kind of more generic
15 information coming out of the house is not important.

16 THE COURT: Well, how is this any different than the
17 scenario that you just stated where they would observe the
18 defendant, follow him, know where he is? By following him,
19 you know, around town, seeing when he goes home, seeing when
20 he is at his office or other places, and then matching that
21 with his public tweets.

22 How is that any different?

23 MR. KEKER: One of the ironies about this is that
24 there are lots of ways to get the information, and some of
25 them are legal and some of them require a warrant. And that's

1 what we're saying.

2 So, to the extent that they could get the
3 information other ways by visual surveillance, by having an
4 informer inside the house, by getting the roommate to tell
5 them what's going on at all times, I mean, those things are
6 different.

7 THE COURT: But again, you're going into areas that
8 they're not requesting, having a roommate saying what's going
9 on in the house, having someone else tell them where he is at
10 all times. That's not what-- Or what he's doing at all
11 times, I think you said. That's not the kind of information
12 the Government was seeking.

13 MR. KEKER: The Government here--

14 THE COURT: What they're seeking, I think you
15 admitted, it's location data and timing data, stuff that they
16 could have observed but for the fact that that would be
17 impractical.

18 MR. KEKER: Yes. But that applies, I suppose that
19 applies to every Fourth Amendment case. There usually is some
20 other way if something else happens--

21 THE COURT: Well, I understand what you're saying,
22 but you keep stepping into beyond what I think this order is
23 directed to by implying that they are trying to get
24 information about what these petitioners are doing inside
25 their house other than just sending a public tweet. Or inside

1 another, inside their office other than sending a public
2 tweet.

3 MR. KEKER: I don't mean to do that. But what I'm
4 saying is that using the mechanism that they are seeking in
5 this order, namely a 2703(d) order--

6 THE COURT: Right.

7 MR. KEKER: Is, amounts to a search under the Fourth
8 Amendment because of the nature of the information that
9 they're seeking about what's happening inside the house.

10 And that information about what's happening inside
11 the house could have been obtained other ways, you're right.
12 And it's not that the information is automatically protected,
13 kind of protected no matter what. It's protected from the
14 Government searching for it this way without a warrant. It's
15 covered by the Fourth Amendment. That's what I'm--

16 THE COURT: All right, I understand.

17 MR. KEKER: I'm saying. And I'm not attempting to
18 exaggerate what they're learning inside the house. They are
19 learning where you were when you were doing all this tweeting,
20 and they are learning it over a long period of time.

21 THE COURT: Okay. That's essentially it.

22 MR. KEKER: Yes, ma'am.

23 THE COURT: Okay.

24 MR. KEKER: And to get it this way is a search under
25 the Fourth Amendment. That's our position.

1 And to avoid, to avoid reaching that or dealing with
2 that, or dealing with the arguments that they make about, oh,
3 there is no expectation of privacy because of this or that, to
4 avoid that we're asking that you apply the statutory remedy of
5 vacating the order because they didn't make an adequate
6 showing. And then we don't get in, you don't have to write a
7 Fourth Amendment opinion about this, I guess is what I'm
8 saying.

9 The Government does say with respect to what we're
10 talking about right now, that there is simply no expectation
11 of privacy about your whereabouts when you're logging onto
12 Twitter. And to just nail the point, Karo, Kyllo, Maynard are
13 all cases that we've cited that say otherwise.

14 If there is a question about whether or not there is
15 an expectation of privacy in this information, then there
16 ought to be a much bigger showing than the one that we have
17 here where both sides are saying what they think the
18 expectation of privacy is.

19 We think it would require a hearing like the Third
20 Circuit told the magistrate judge in the Third Circuit opinion
21 to do. And you'd have to figure out a couple of things. One
22 is that you would have to figure out what people expect with
23 respect to whether or not the Government can track their
24 movements and association in the way that this order does.

25 As Justice Scalia said in Kyllo, this expectation of

1 privacy rubric that we've all heard since 1967 in Katz is sort
2 of circular. I mean, it becomes what the courts say it is.

3 But what our point is, that this is not phone
4 records where you know on your bill you're going to get a bill
5 that says who you've called. I mean, it's not bank records
6 where the courts have talked about voluntarily turning things
7 over. This is something different.

8 Nobody-- And in a hearing we believe we could show
9 that not nobody, but most people, the vast majority of people
10 have no idea that Twitter collects the information about their
11 whereabouts and--

12 THE COURT: Well, your clients seem like pretty
13 knowledgeable people, and they did agree to Twitter's privacy
14 policy, did they not?

15 MR. KEKER: They-- I wouldn't accept that they
16 agreed to Twitter privacy policy.

17 THE COURT: They were informed of it at any rate--

18 MR. KEKER: They went ahead with Twitter in the
19 face-- I have had those things pop up on my screen every time
20 I have gotten a new program. I think their-- I have--

21 THE COURT: So, you don't read them?

22 MR. KEKER: I have never read the whole thing. So,
23 saying that they agreed to it, it was jammed down their
24 throat. Yes, it appeared on their screen, there is no
25 question about that.

1 THE COURT: Well, it would be a condition of
2 creating a Twitter account, would it not?

3 MR. KEKER: Correct, that's true.

4 THE COURT: Okay. And they agreed to that, correct?

5 MR. KEKER: They created a Twitter account, that's
6 certainly true.

7 THE COURT: All right. Subject to that. Okay.

8 MR. KEKER: And that is one factor, I totally agree,
9 that would be as useful factor for the Government in this
10 hearing where you tried to figure out what a reasonable
11 expectation of privacy is. But I would argue that there would
12 be ways to overcome that.

13 This is something really sort of brand new which, if
14 allowed, permits the Government to know a lot more
15 electronically than people are used to them knowing. When
16 you're at home, when you're at your office, when you're
17 elsewhere, what you're saying when you are at those places.

18 So, our position is that if the Fourth Amendment
19 argument needs to be addressed, there ought to be a hearing on
20 the Fourth Amendment to determine what the reasonable
21 expectation of privacy is and whether or not society can
22 tolerate that reasonable expectation of privacy, which is the
23 other prong.

24 THE COURT: All right.

25 MR. KEKER: So, unless you want, unless there is

1 more to talk about on the Fourth Amendment side--

2 THE COURT: What authority do you have for the
3 noncitizens living abroad having rights under our
4 Constitution?

5 MR. KEKER: The Constitution as I understood-- The
6 case that the Government cites, as you know, of course, deals
7 with a kidnapping and virtual mugging that happened outside
8 the United States in Mexico. It's my understanding that the
9 Constitution of the United States applies to things that
10 happen in the United States.

11 This is an order issued by a United States court
12 which is bound by the Constitution to a U.S. company which is
13 covered by the Constitution whose records are all in the U.S.
14 where they are covered by the Constitution that affects United
15 States citizens like my client, Mr. Applebaum, who is,
16 needless to say, protected by the Constitution. And the fact
17 that some non-American citizens participate in this gathering
18 or are part of this gathering of information doesn't make the
19 Constitution go away.

20 THE COURT: Okay.

21 MR. KEKER: And we believe that the Constitution
22 applies fully to these Twitter records. We think that
23 Twitter, if they were here, would want it to.

24 And the idea that American-based social networking
25 systems or server systems or Internet systems, which by

1 definition, operate in cyberspace all over the world, aren't
2 protected and their records aren't protected by the U.S.
3 Constitution is, we believe is wrong.

4 THE COURT: Okay. I understand. Thank you.

5 What's the Government's opposition to this?

6 MR. KEKER: And there are cases cited at footnote 9
7 of our reply brief --

8 THE COURT: Okay.

9 MR. KEKER: -- that we think answer that question.
10 So, let me move very briefly to the first--

11 THE COURT: Oh, I'm sorry, I thought you were
12 finished. Go ahead.

13 MR. KEKER: I'm almost finished, Your Honor.

14 THE COURT: Okay, go ahead.

15 MR. KEKER: Let me talk briefly about the First
16 Amendment. There can't be much question that the original
17 order seeks information about associations. In NAACP versus
18 Button a Government subpoena that asked the NAACP for all, a
19 list of its members was challenged under the First Amendment.
20 In that case there were other ways that they could have gotten
21 the information, but the subpoena was challenged because it
22 unnecessarily burdened the rights of association. Our
23 argument here is somewhat, is somewhat the same.

24 The original order seeks information that really
25 could map your affinity groups, who you communicate with, when

1 you communicate with them, from where you communicate with
2 them. It really does allow a mapping of who your association
3 is.

4 And again, I am back to Egypt, Tunisia. I mean,
5 imagine if the Government, and I think the Government did try
6 to get that information because it's incredibly useful to know
7 what the political opposition is doing and who they are
8 talking to and when. When those groups are brought together
9 on social networks around an issue, whether it's the
10 revolution in Egypt or Wikileaks or any other political event,
11 the First Amendment has to come into play.

12 How much Government-- And the question is how much
13 Government surveillance and mapping of the affinity groups
14 does it take to chill the First Amendment rights of free
15 speech and association? If I learn that by communicating with
16 Jake Appelbaum or following Jake Appelbaum or learning his
17 political views Big Brother will have my name in a file, will
18 I stop paying attention to those tweets?

19 So, at a minimum we believe that Fourth Circuit law
20 and U.S. law requires a balancing of what the chill on the
21 First Amendment rights of association and free speech are
22 against the Government's need for the information. And it
23 can't just be blithely ignored by calling them business
24 records.

25 You have got to ask, I mean, how much chilling of

1 speech is there? Is the order too broad? Does the Government
2 need all these documents? Does it outweigh the chilling of
3 speech?

4 And again, that leads to a hearing. And again, that
5 leads to the doctrine of constitutional avoidance, which we
6 think is best answered by simply vacating the order, letting
7 the Government regroup, figure out what it wants to do. It
8 has other ways to get at least some of this information, as
9 you know.

10 And with that, Your Honor, if I don't have any, if
11 you don't have any questions, I will sit down.

12 THE COURT: I don't. Thank you.

13 MR. KEKER: Thank you.

14 THE COURT: Why don't we go ahead and have Ms. Cohn
15 argue the motion to unseal.

16 MS. COHN: Your Honor--

17 THE COURT: Are you not-- I'm sorry, you're not
18 arguing--

19 MR. COHN: My colleague, Mr. Fine, is going to argue
20 the part of the motion to unseal that you--

21 THE COURT: Okay, Mr. Fine. I'm sorry, you're
22 right. I did write that down. Sorry.

23 MR. FINE: Good morning, Your Honor.

24 THE COURT: Good morning.

25 MR. FINE: Aden Fine. And once again, I'm going to

1 be speaking on behalf of all the movants here.

2 THE COURT: All right.

3 MR. FINE: And this motion to unseal deals with our
4 attempt to unseal the remainder of the documents that were
5 associated with the December 14 order to Twitter. And as
6 well, we are seeking to unseal any other similar orders and
7 applications that were issued to other companies.

8 Your Honor, this motion deals with the Government's
9 attempt to obtain private information about Internet
10 communications and the Government's attempt to do so in
11 secret.

12 They shouldn't be able to get this information in
13 the first place, as Mr. Kecker just explained. But above all,
14 they shouldn't be able to do so in secret. That's not how our
15 system works, and it shouldn't be permitted here.

16 In our judicial system there's a clear presumption
17 of open access to court documents. And it's the Government's
18 burden to overcome that clear presumption. They haven't met
19 that burden here and they can't meet it here.

20 In these specific circumstances with these specific
21 documents, the Government cannot demonstrate that its
22 interests in maintaining secrecy here heavily outweigh both
23 the movants' and the public's significant interest in
24 obtaining access to these documents.

25 And before we get into the law, I think it's

1 important to understand exactly what's at issue here and who's
2 involvement. The movants are three individuals who, like many
3 people, use the Internet to communicate with individuals
4 around the world on a variety of different subjects.

5 These individuals have apparently been swept up in
6 the Government's investigation into the Wikileaks Web site.
7 That investigation has been extremely high profile both here
8 and around the world. And it's safe to say that the entire
9 world is watching to see what the American Government's
10 response and what our courts' responses will be to this highly
11 controversial and politically charged matter.

12 And this is not just an ordinary request for
13 information by the Government either. Here the Government has
14 chosen not to use a warrant, but to obtain a court order based
15 on showing less than the probable cause that would have been
16 required to get a warrant. And they have done so, as Mr.
17 Keker just explained, in order to get detailed information
18 about individuals' Internet communications, including private
19 information such as who they direct messaged with. Which is
20 Twitter's way of private messaging.

21 So, in these circumstances, Your Honor, the
22 Government's burden to overcome the clear presumption of open
23 access is especially high, and they haven't met that burden
24 here for several reasons. First, the Court has already
25 unsealed the Twitter order. And the Court has already

1 determined, based on the Government's request to do so, that
2 it's in the best interests of the Government's investigation
3 to remove that secrecy.

4 Given that, there is no reason, let alone a
5 compelling reason, why the Government needs to maintain
6 secrecy over the rest of the Twitter dockets and over the
7 other similar orders and applications.

8 The disclosure of the Twitter order has revealed two
9 key facts. First, it's confirmed that there is this
10 investigation. It's confirmed the existence of the
11 investigation.

12 Second, and critically, it's confirmed that the
13 Government is attempting to get information about movants'
14 communications.

15 Those two facts are critical because as a result of
16 them, the traditional reasons for secrecy, such as not wanting
17 to tip off witnesses or subjects or targets, not wanting to
18 risk the potential destruction of evidence, and not wanting to
19 risk potentially exposing innocent parties to the public's eye
20 and to the public scrutiny, none of those traditional reasons
21 for secrecy are still present here.

22 And as a result, the Government simply cannot meet
23 their burden. And that's common sense, but it's also the
24 clear law. And the Fourth Circuit Court has made clear that
25 when information is already publicly known, the Government

1 cannot have a compelling interest in keeping secrecy over that
2 information. And that's the Virginia state, the Virginia
3 Department of State Police case makes that clear, Your Honor.

4 Simply put, the Government can't have it both ways.
5 They can't say on the one hand it's in the best interests of
6 the investigation to remove the secrecy and then turned around
7 and say, but we still need to keep everything secret. They
8 simply can't do that here, Your Honor.

9 And because the Court has already determined that
10 it's in the best interests of the investigation to remove the
11 secrecy, the Government simply cannot meet their burden.

12 THE COURT: Don't you think that there is a
13 difference though between revealing the existence of an
14 investigation and the details of what the Government is
15 looking at?

16 MR. FINE: Of course there is a difference, Your
17 Honor.

18 THE COURT: Sure. And wouldn't that be a problem
19 with regard to releasing the contents of the affidavit?

20 MR. FINE: The release of the order itself has
21 revealed those two key facts. Not just that there is the
22 existence of this investigation, but it's revealed what
23 information the Government is seeking. They are seeking
24 information about movants' communications.

25 As a result--

1 THE COURT: But the basis for that and why the
2 Government is seeking that information, why wouldn't that be
3 subject to-- Because it's the reason for the investigation,
4 because it's the basis for asking for this, the details of the
5 investigation. Why wouldn't that be subject to being held
6 private at this point--

7 MR. FINE: The only reason, the only reason that
8 that information is ever held subject to secrecy is if it's
9 necessary to accomplish the traditional reasons. You don't
10 want to tip people off. You don't want somebody to go out and
11 destroy evidence.

12 THE COURT: All right.

13 MR. FINE: You don't want to expose innocent people
14 to the public's eye if they are eventually not going to be
15 prosecuted.

16 None of those reasons are present here because they
17 revealed the Twitter order. We now know they are trying to
18 get this information.

19 If any of these risks-- If there were any need for
20 secrecy, that would have existed before the Twitter order was
21 released. Now that it's released, everything has changed,
22 Your Honor. And the only thing that remains is just facts.

23 This is not, we're not trying to get into the
24 Government's investigative files or into grand jury
25 proceedings.

1 THE COURT: Well, wouldn't you be doing that by
2 asking to have this order, to have the affidavit released?
3 Which would presumably detail why the Government is looking at
4 the associations and why that's pertinent to their
5 investigation.

6 MR. FINE: Yeah, but, Your Honor, the Government is
7 not entitled to secrecy over facts just because they don't
8 want the other side to know them. There has got to be a
9 reason for that. Our system isn't based on secret evidence
10 and secret trials.

11 THE COURT: Well, that's the whole point though. We
12 aren't at the point of a trial. This is just the
13 investigation.

14 And I think, don't you think that there is a
15 different standard there in terms of the Government having to
16 release everything that it already has established in an
17 investigation or suspects in an investigation and the reasons
18 for why they want more information?

19 MR. FINE: We're not asking for everything that they
20 have.

21 THE COURT: Well, that's what you're asking for if
22 you ask me to unseal that affidavit.

23 MR. FINE: We're asking for everything that they
24 gave the Court to persuade the Court to issue a judicial
25 order.

1 THE COURT: Right. What's the difference?

2 MR. FINE: There is a big difference, Your Honor.
3 We're not trying to conduct discovery here. We're trying to
4 know what are the facts that the Court was given by the
5 Government --

6 THE COURT: Yes.

7 MR. FINE: -- to reach its conclusion.

8 THE COURT: Why is that not, why does the Government
9 not have the right to have that private, to have that secret
10 at this point when there has been no charges brought, nothing
11 that involves these petitioners that would, you know, elevate
12 this to the next step where you would have the right to see
13 that?

14 MR. FINE: Your Honor, the Fourth Circuit has made
15 clear that just because something is an ongoing criminal
16 investigation, even preindictment, that's not sufficient to
17 warrant the extraordinary measure of sealing documents.

18 Here the Government has failed to show why in these
19 specific circumstances with these specific facts postrelease
20 of the Twitter order, why they still need secrecy. And the
21 Fourth Circuit has made clear that absent that specific
22 showing, it's improper to seal documents. And that's why
23 we're here, Your Honor, why we're asking you to do this.

24 THE COURT: I understand. Thank you.

25 MR. FINE: The only real fact that the Government,

1 the only real risk that the Government points to that might
2 unfold if the rest of these documents are unsealed is that
3 they claim that it hasn't yet been publicly confirmed who
4 these other companies are that may have received these other
5 orders. But that normal risk of witness intimidation or
6 witnesses fleeing is simply not present here, Your Honor.

7 The companies that likely received these other
8 orders are huge companies over whom the movants have little or
9 no influence. These companies are not going to flee and they
10 are not going to destroy evidence just because we're here
11 seeking to unseal these documents.

12 Besides, if there were any risk that the movants
13 would attempt to influence these companies, which they are not
14 going to do, but if there were any risk, that would have been
15 caused by the Government unsealing the Twitter order in the
16 first place. Movants obviously know which other companies
17 they have accounts with.

18 So, there is no-- The key I guess here, Your Honor,
19 is there is no additional risk that would be posed by
20 unsealing these additional documents.

21 The second reason why the government cannot meet its
22 burden here, Your Honor, is that movants have a strong reason
23 for needing these documents unsealed. They need these
24 documents unsealed so that they can properly challenge the
25 underlying orders which, in our view, implicate their

1 constitutional rights. Absent unsealing both the Twitter
2 application and the other applications and orders to other
3 companies, movants will effectively be prevented from doing
4 so. And that's simply not permissible, Your Honor.

5 The final reason, and this is a critical reason why
6 the Government cannot overcome their burden, their heavy
7 burden in these circumstances, is that the public has an
8 immense interest in having these documents unsealed.

9 As I mentioned, this investigation has sparked an
10 intense national and international debate over what the proper
11 response is to this Wikileaks Web site. And it's safe to say
12 that this story has consumed the press, the American public
13 and the current administration. And unsealing these documents
14 would greatly contribute to the public's ability to
15 meaningfully participate in this ongoing debate. And it would
16 greatly benefit the public to have a better understanding of
17 what our Government's response has been and what our courts'
18 responses have been.

19 And unsealing these documents would also ensure that
20 the judicial process is functioning properly. That Government
21 is not overstepping its bounds. That reasoned and appropriate
22 decisions are being made. And that fairness and justice are
23 occurring and that they are not being sacrificed just because
24 this is a highly controversial and charged matter.

25 Those are the reasons why for decades the Supreme

1 Court and the Fourth Circuit have made crystal clear there is
2 a reason why our judicial system is open. And the reason is
3 that we need to allow the public to serve as that watchful eye
4 on our Government's operations and our courts.

5 And the Government is trying to avoid that here. I
6 understand we don't know all the facts that they have
7 presented in their affidavits, but just because they don't
8 want us to know that isn't a sufficient reason under the clear
9 case law for sealing that information. They have presented it
10 to the Court, and the public and movants are entitled to get
11 that information.

12 On the other side of the balance, what the
13 Government's argument essentially boils down is simply they
14 broadly assert that this is an ongoing criminal investigation,
15 it's preindictment, and that, therefore, there must be secrecy
16 per se no matter what.

17 But the Fourth Circuit Court has made clear that
18 that is not a sufficient reason to overcome the Government's
19 heavy burden of justifying closure. And again, in the
20 Virginia Department of State Police case, which is at 386 F.3d
21 567 at 579, the Fourth Circuit made clear that although there
22 is a general interest in maintaining the integrity of ongoing
23 criminal investigations, that enough is not sufficient to
24 warrant sealing documents.

25 Instead, the Fourth Circuit made clear the

1 Government has the burden, and again they haven't done that
2 here, of showing specific facts and specific reasons why this
3 particular investigation will be compromised if the remainder
4 of the documents are unsealed.

5 Given that we already know the Government is
6 attempting to get movants' information and that we already
7 know about the existence of this criminal investigation, the
8 Government simply can't meet that burden.

9 One final point, Your Honor. It appears that there
10 is still not a public docket for any of these materials that
11 we're discussing here today. And the absence of that public
12 docket is simply not permissible.

13 And the Fourth Circuit Court has made repeatedly
14 clear, and it's very clear in a long line of cases, that
15 judicial records need to be put on the public docket in a
16 manner sufficient to provide the public with notice that the
17 Government is attempting to seal certain things in a
18 sufficient manner to provide the public with an opportunity to
19 challenge or to object to such sealing.

20 And that principle holds true even in time
21 sensitive, otherwise secret matters such as search warrant
22 proceedings, and the Baltimore Sun versus Goetz case makes
23 that crystal clear.

24 In those kinds of situations that otherwise would be
25 kept secret, the Court doesn't necessarily need to docket the

1 material in advance of sealing the materials, but the solution
2 that the Fourth Circuit came up with, and it makes perfect
3 sense, is once the order is sealed, once there is any sealing,
4 you have got to put that on the public docket so that anybody
5 can come in and say, wait a second, why is this sealed? I
6 object. That hasn't been done here, and it needs to be done,
7 Your Honor.

8 So, movants request that the Court at a minimum
9 order that the docket, that there be public docketing of all
10 the materials that were associated with the December 14 order
11 to Twitter, and that there be public docketing for all the
12 other orders that the Government obtained and all the other
13 applications that the Government submitted in order to get
14 those other orders.

15 We still don't know about those documents, or I
16 assume they were all put under seal, but the solution is the
17 Court has to order the Clerk's Office to put all those on the
18 public docket.

19 THE COURT: Okay.

20 MR. FINE: Thank you, Your Honor.

21 THE COURT: Thank you, Mr. Fine.

22 Who is arguing this for the Government?

23 MR. DAVIS: Your Honor, I will address the motion to
24 vacate. Mr. Peterson will address the unsealing issues.

25 THE COURT: All right.

1 MR. DAVIS: Your Honor, the parties have stated that
2 something brand new is happening here. And, of course, as
3 this Court knows, nothing of the kind is occurring. This is a
4 routine 2703(d) application and order, lawful in all respects
5 for subscriber information and for connection records.

6 There is no content involved. There are four
7 accounts identified. There is a six-and-a-half month period
8 particularized in the affidavit. There is nothing burdensome,
9 there is nothing voluminous, and there is nothing required of
10 the parties here.

11 This is a standard, as this Court knows very well,
12 investigative measure that is used in criminal investigations
13 every day of the year all over this country. And we don't
14 back away from that. This is a routine 2703(d) case.

15 I'd just make a few points. One is that the parties
16 say almost nothing about the standing limitations. And this
17 is an unusual statute in that there is a very clear standing
18 statute right in the Electronic Communications Privacy Act.
19 Section 2708 says that non-constitutional grounds cannot be
20 raised.

21 And so, although the parties say we raise first and
22 foremost a statutory challenge, the same statute says they
23 can't do that. And there is good reason for that. It's
24 because Congress has designed an ex parte proceeding that
25 allows for efficient resolution of criminal investigations and

1 does not allow for parties to bring what are like motions to
2 suppress and long inquiries about those decisions in the first
3 instance.

4 The subscribers only have the remedies in that
5 statute. And in this noncontent case, they're not even close
6 to having a statutory remedy. And we would urge the Court to
7 make that clear in resolving this matter. There is no
8 standing here to raise a statutory claim.

9 As for the statutory challenge, this Court has
10 already determined based on the application filed that there
11 are specific and articulable facts that meet the standard in
12 the statute, and that is as it should be. The Court has made
13 that finding. There is no motion to suppress allowed here.

14 And the parties' best argument is, well, maybe there
15 is connections that someone has made that don't relate to the
16 criminal investigation. And I would say that is a certainty
17 here. That is, there are, I am sure, connection records of IP
18 address connections to the Internet that turn out to have
19 nothing to do with the criminal investigation.

20 But again, that is, as it should be, an efficient
21 and fair criminal investigation. And these records are no
22 different than when a grand jury subpoenas telephone toll
23 records and gets a bunch of phone calls, not all of which are
24 relevant and material to the case. Or a bunch of credit cards
25 that show transactions, only some of which are relevant.

1 But surely the law does not require and certainly
2 the providers of this world don't want a regime where only,
3 where a relevancy decision has to be made at the outset.
4 That's not the way investigations function. There is no
5 reason it should function that way here.

6 Your Honor, the parties make much of the Court's and
7 urge the Court to exercise its discretion to even if, assuming
8 that the Government has met the specific and articulable facts
9 standard, to exercise its discretion to say, well, in this
10 case we think the Government should have to provide more, it
11 should have to provide probable cause and meet the Fourth
12 Amendment standard. And they base that argument, of course,
13 on the Third Circuit opinion.

14 We think, respectfully, that the Third Circuit
15 opinion is unsatisfactory in that respect. And we think even
16 the concurring opinion in that same opinion makes clear that
17 it is an unworkable situation for magistrate judges around the
18 country where there are no standards and a judge has the
19 discretion to say, well, here we're going to require more even
20 though the Government has met the standard.

21 And that's not to say the Court doesn't have
22 discretion. Of course the Court has discretion to make or not
23 make orders under 2703(d) for lots of reasons. For instance,
24 the Court could say, well, you've met the factual showing, but
25 this is an unusually voluminous court order, or the amount

1 you're asking for is too much, or there are other undue
2 burdens. Those kinds of considerations are right in the
3 statute. Of course the Court retains discretion to determine
4 those kinds of issues.

5 What the Court doesn't have discretion to do is to
6 change the rules in the middle of a 2703(d) proceeding and to
7 say, I acknowledge that you have met the factual threshold
8 required in the statute, but I am going to raise the bar. And
9 that, that is not, that's the opposite of reasoned discretion,
10 and it's the opposite of the rule of law.

11 And we strongly believe that the Third Circuit
12 opinion in that respect is not destined to be celebrated and
13 emulated in other courts around the country.

14 Turning now to the Fourth Amendment argument. Our
15 argument is quite simple. This case is controlled by Smith v.
16 Maryland. Just as in pen registers from a land line phone
17 inside a home, there is no Fourth Amendment issue.

18 So too are the IP address records here in the same
19 guise. We also say, as two Courts of Appeals have already
20 said in Forrester and Christie, there is no reasonable
21 expectation of privacy in voluntarily conveyed IP addresses.

22 It's a remarkable argument and an excellent-- There
23 is a lot that is being done in this argument, and I admire it
24 in many ways, but what the defendants are doing is they're
25 weaving together two strands of Fourth Amendment law. One is

1 the Karo and Kyllo strand that has to do with the private, the
2 private events that occur in one's own home.

3 And the second strand of Fourth Amendment law is the
4 privacy interest in public movements and going around and
5 moving from place to place that come up in cases say involving
6 GPS and tracking devices.

7 And the two doctrines are woven together, but
8 consider the argument just briefly. First of all, IP
9 addresses don't show location with precision. This is not
10 location information in the same sense that GPS information
11 is. It is less geospecific than things like a land line phone
12 telephone call is, or certainly a tracking device.

13 Also, Karo and Kyllo involve surreptitious
14 technology that was implanted by the Government. I mean, Karo
15 is the tracking device that was put inside the can of ether
16 and painted up, and this is a big surreptitious step by the
17 Government.

18 That is completely absent here. The Government
19 hasn't done anything. These are just ordinary computers that
20 are functioning the way everyone knows computers function.
21 There is nothing secretly installed here. And to say that
22 this raises a Karo issue is creative to say the least.

23 We also think that the, that routinely subpoenaed
24 phone, routinely subpoenaed records, including phone records,
25 show activity in a home much better than these IP address

1 connection records, again as in land line phones. Or
2 traveling is shown in credit card record cases where
3 transactions show where someone was and making what purchase
4 or ATM deposit or whatever it is. Those kinds of things are
5 subpoenaed all the time, and we don't hear that this is a
6 Fourth Amendment violation.

7 We also commend to the Court footnote 2 in Bynum.
8 The Fourth Circuit Court hasn't said much about this, but it
9 has said in the Bynum case that IP addresses are, quote,
10 numbers that Bynum never possessed.

11 I mean, the Fourth Circuit is looking at IP
12 addresses and noting that IP addresses are generated
13 automatically by an ISP. And, of course, in a dynamic IP
14 address situation, they are assigned from a battery of numbers
15 and they change all the time.

16 To say that Bynum possessed this number, that it's a
17 paper in effect under the Fourth Amendment, is a bit of a
18 stretch. And again, the Fourth Circuit doesn't make a holding
19 there, but it is-- Again, to say that an IP address is
20 possessed even in the same way that a phone number is
21 possessed, is taking it far.

22 Lastly, Your Honor, about the Fourth Amendment. As
23 to the Third Circuit case, there is a great deal made of the
24 Third Circuit opinion in the parties' excellent papers in this
25 case. But note what the case actually does. It rejects the

1 conclusion that a search warrant is required for cell site
2 location information. It cannot accept the view of the
3 magistrate judge in that case that cell site location
4 information can be considered information from a tracking
5 device.

6 It finds no evidence that historical CSLI as it is
7 called, even when focussed on GPS cell phones, extends to
8 privacy interests in the interior of the home. And it holds
9 that cell site location information is obtainable under
10 2703(d) without probable cause. That is, the holding of that
11 case is not at all, doesn't get the defendants or the parties
12 very far.

13 So, we think that Smith v. Maryland is clear. The
14 Courts that have looked at this have made that holding. And
15 we would urge the Court to do the same.

16 As to the First Amendment, I will only say, this is
17 not about association rights. And it's not about politics.
18 It's about facts and evidence. And certainly communications
19 among people may show associations, but the Government in this
20 case is not seeking a membership list. It is focusing on four
21 Twitter accounts. It is a subpoena not to these subscribers.
22 It is to an American corporation for business records.

23 It is not for content. It doesn't have anything to
24 do with the speech in the case. And it is only a search for
25 what are like toll records from a phone company.

1 And it also is about things that are of their nature
2 public statements. Tweets are public statements uniquely and
3 widely available.

4 There is no showing of overbreadth. This is a
5 narrowed 2703(d) order. There is no showing of bad faith, and
6 the parties don't allege that.

7 And so, we reject-- To some extent it's hard to
8 discern what is the First Amendment claim that the parties are
9 makings.

10 Lastly, Your Honor, I wanted to address very briefly
11 the international comity question which pertains to Ms.
12 Jonsdottir who is a member of Parliament in the nation of
13 Iceland. I wanted to make clear that we do not agree and
14 concede, as is stated in the reply brief, that this order
15 would violate Icelandic law. We don't think the parties have
16 made that showing.

17 They have shown that there is an article in the
18 Constitution that says that a legislator may not be subject to
19 custody, and a criminal action may not be brought against that
20 legislator. This is not a criminal action against Ms.
21 Jonsdottir or anyone else at this point.

22 It also says that no member of the Parliament may be
23 held accountable for statements made by that person in the
24 Parliament except with consent. But this is not about
25 Parliamentary statements or Parliamentary events.

1 This is a case where Ms. Jonsdottir's status as a
2 Parliamentarian is incidental and not integral to the
3 investigation into the facts sought. And there is no hardship
4 or burden on Ms. Jonsdottir as a Parliamentarian or on the
5 Parliament of Iceland by this 2703(d) order.

6 But we think that the international comity issue
7 here is much easier than that in say the Bank of Nova Scotia
8 cases that involve subpoenas for bank records that are
9 overseas where U.S. courts routinely say that even though
10 there is a bank secrecy law in Germany or in the Cayman
11 Islands, the grand jury in America has a right and a duty to
12 investigate serious crime. And the American court applies
13 U.S. law to allow that.

14 Here, of course, this isn't, these aren't records
15 overseas. We don't see a violation of Islandic law. And a
16 fortiori, we think international comity does not block the
17 right of the Government to investigate these matters.

18 THE COURT: All right. Thank you.

19 MR. DAVIS: So, unless the Court has questions--

20 THE COURT: No, I have no further questions.

21 MR. DAVIS: Thank you.

22 THE COURT: I will hear argument on the motion to
23 unseal.

24 MR. PETERSON: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. PETERSON: Andy Peterson. Because I have the
2 benefit of going last, I will also try to bear the burden of
3 being brief.

4 THE COURT: Okay.

5 MR. PETERSON: At root, the subscribers basically
6 want to turn the common law right of access to judicial
7 documents into a right to notice when a 2703(d) order or other
8 process has been issued against them.

9 Even if that common law right of access exists, it
10 doesn't require unsealing the sealed application in this
11 instance or, to the extent they exist, other sealed records
12 when a criminal investigation is ongoing long before any
13 charging decision is made.

14 I think that's supported by clear Fourth Circuit
15 case law. In the Baltimore Sun case cited by the movants, the
16 court said that a search warrant affidavit after it's
17 executed-- And clearly there is some public notice after the
18 execution of a search warrant-- In fact, the aggrieved party
19 may know that the search has occurred. But sealing of the
20 affidavit can be justified long past the execution of the
21 warrant because it can disrupt ongoing investigations or it
22 may describe continuing investigations.

23 In addition, in Media General Operations versus
24 Buchanan, the Fourth Circuit also acknowledged that a search
25 warrant affidavit could be sealed because it could contain

1 sensitive details of ongoing investigations.

2 And at least as to the affidavit, which is a
3 document, or the application which the Government acknowledges
4 exists, we think that those harms are present here. That
5 application, the release of it, it contains, obviously as has
6 been described and the statute describes, a specific, a
7 statement of specific and articulable facts regarding why the
8 records sought are relevant to the investigation. Release of
9 those facts, and those facts have not been made public, would
10 damage the ongoing investigation.

11 The Virginia Department of State case which is cited
12 by the movants actually recognized that one compelling
13 government interest that's justified in protecting is the
14 protection of facts in an investigation that had not been made
15 public.

16 And that case which they rely on significantly is
17 quite different from the case here. It was a civil action
18 brought by a person who had been wrongfully imprisoned. And
19 the documents at issue had actually been discovered to the
20 plaintiff under a protective order. And in the midst of
21 litigation, the Government had waived or at least publicized a
22 number of those documents already.

23 And that's not what we have here. The movants have
24 said that the Government in agreeing to the release of the
25 original order had waived any harm that could come, but the

1 facts that are in, the specific and articulable facts as
2 pointed out by Your Honor are of a different kind than what
3 has already been released. And it's the Government's
4 position, and we think well supported by the case law, that
5 the release of those facts would cause damage to the ongoing
6 investigation.

7 There is no procedural error here because there is
8 no argument, at least not in oral argument, that the 2703(d)
9 proceeding is conducted ex parte. And Baltimore Sun indicates
10 that when that type of proceeding occurs, and this is
11 consistent with Local Rule 49, that when a sealing order is
12 issued, it's issued after the judicial order is entered and
13 docketed that shows its nature as a motion to seal.

14 That's basically what occurred in this case briefly
15 on the docketing issue. It's unclear to me at least when you
16 go to the public docket now and enter this case number in, you
17 get a response of under seal. And that's all that the public
18 is entitled to in the sense that when a pen register is
19 docketed or a search warrant, and that's exactly what was at
20 issue in Media General Operations. What's usually docketed is
21 simply the application and the order. There is no back and
22 forth. It is an ex parte hearing.

23 The public docket indicates that a sealing order has
24 been filed. And that's sufficient under Federal Rule of Civil
25 Procedure or Criminal Procedure 55 and the Fourth Circuit

1 Court's decision in Media General Operations. In that case
2 search warrants were docketed the same way by this Clerk's
3 Office. A notation was made that a search warrant had been
4 executed and that the affidavit was filed under seal. And
5 that was sufficient public notice for the Fourth Circuit.

6 In terms of the presumption of access and the
7 benefit to the investigation, I would just like to point out
8 that this is substantively different from any of the cases
9 that the plaintiffs have cited or the movants have cited about
10 public access. It's in the middle of an investigation, in
11 fact in the preliminary stages of an investigation.

12 And unlike a search warrant, the right that the
13 plaintiffs assert, a search warrant is executed. And when the
14 sealing order is docketed after the Government has collected
15 the information, the aggrieved party can come back and
16 litigate the issue.

17 Here the movants want to intervene prior to any
18 collection or prior to actually the investigative tool
19 issuing. And the Supreme Court in SEC versus O'Brien, as well
20 as this court or the Fourth Circuit in In Re swearing in, held
21 that even the existence of a right does not provide a
22 substantive procedural right to notice that process has been
23 issued.

24 We think that that applies to the other sealing
25 orders to the extent they exist if they are out there. And

1 that the fact that unsealing of those documents would reveal
2 public facts or facts that have not been made public is a
3 sufficient compelling interest at this stage to keep the
4 documents sealed.

5 THE COURT: All right, thank you. Did the
6 petitioners have anything to add in rebuttal?

7 MR. KEKER: Yes, Your Honor. Briefly. I have got
8 five points to respond to Mr. Davis. Let me start with the
9 first one, which is standing which he raised, and I didn't, I
10 didn't talk about.

11 The Government seems to think that you cannot
12 challenge, make even a constitutional challenge to, as an
13 aggrieved party to an order to compel production to a third
14 party. That is simply wrong. Eastland versus U.S.
15 Servicemen's Fund was cited in our brief.

16 But more importantly, the statute that he pointed
17 to, 18 U.S.C. 2708, talks about these are exclusive judicial
18 remedies for non-constitutional challenges. It should be, I
19 believe, obvious that asking a court of the United States to
20 stop something that has constitutional consequences and that
21 may be unconstitutional, is something that a party has a right
22 to do.

23 So, we think that their argument about the, about no
24 standing is simply irrelevant and wrong.

25 The second point I wanted to make is the admission

1 that he makes. He said blithely after saying that you can't
2 challenge what we're doing, he said of course a lot that we're
3 subpoenaing is irrelevant, that's the way it always is when we
4 send out subpoenas or do search warrants.

5 Well, we are looking at the words of the statute and
6 the words of the Fourth Amendment and are making arguments
7 based on that. The words of the statute, which they just want
8 to blow off, say that what they subpoena, what they go get
9 under a 2703(d) order has to be relevant and material to an
10 ongoing investigation.

11 Imagine if you were sitting in a civil case or a
12 criminal case and somebody comes to you with a Rule 17
13 subpoena and says, we want to subpoena this. And somebody
14 cites the Nixon case and says, this has got to be relevant and
15 material. It has to have some evidentiary impact. You'd say,
16 well, no, you can't go on a fishing expedition under those
17 circumstances.

18 If they want go on a fishing expedition, they should
19 try to do it under a search warrant. They should try to do it
20 with a subpoena. There are other remedies and there are other
21 arguments there. This statute doesn't permit it.

22 The third point is that we seem to agree that the
23 magistrate judge has discretion to deny, narrow, change an
24 order that is sought under 2703(d).

25 They say that the Third Circuit's opinion in that

1 regard is wrong, it is going to be turned around, but we all
2 seem to agree that there has got to be some discretion in the
3 Court. And this goes back to the standing point. We're
4 making a constitutional challenge. And what we're saying
5 under-- As we've argued.

6 And they say there is no standing for anything other
7 than a constitutional challenge and, therefore, we can't argue
8 about the statute.

9 Whenever you make a constitutional challenge under
10 the doctrine of constitutional avoidance, if there is some way
11 to solve the case and get rid of the problem legally and
12 properly that doesn't require you to make highfalutin
13 constitutional rulings, then you should do it. And that's
14 what we're arguing about here.

15 Then the fourth point, on to the Fourth Amendment.
16 They say, don't worry about this, phone records and IP
17 addresses are just the same. There is a couple of cases,
18 Forrester and Christie, that say so.

19 Well, first, and we've argued this at length in the
20 briefs, I won't go over it again, but let me just point out
21 that Forrester and Christie are cases where what was being
22 argued is you can't come and look at where I go on the
23 Internet. You know, you go to my computer and what you do is
24 put a register on it and you find out whether or not I go to
25 porn sites or I go to this site or I go to that site. And,

1 therefore, I have an interest in that IP address.

2 We have argued that Forrester is wrong and Christie
3 is inapplicable, but you don't have to go much farther than
4 this to say neither of those cases deal with tracking somebody
5 for a year or six months as they move from computer to
6 computer, communicating with a wide variety of people. They
7 just-- This is not a case about what Web sites you visited.
8 This is a case about where you were when you made various
9 kinds of speech, political and apolitical, relevant and
10 irrelevant.

11 And the fact that some of this information, or even
12 all of it, could under different, we talked about this before,
13 conceptual circumstances be obtained by a search warrant, a
14 subpoena, visual observation, other investigative means, is
15 simply irrelevant to the question that we're raising. Which
16 is, is this a search under the Fourth Amendment with all the
17 rules that go with that?

18 And then the final point because you have been
19 listening a long time patiently, and I'm sorry to go so long
20 now, is on the First Amendment.

21 I mean, again, the Government, this is routine.
22 There is no chilling effect they assert. This is not
23 overbroad. They just assert.

24 We're not seeking membership lists. We're saying
25 that you're getting affinity groups. They say, we're not

1 seeking membership lists. This is argument by assertion about
2 why the First Amendment isn't implicated here. Don't worry
3 about it, it's routine.

4 And we're rejecting that and arguing exactly the
5 opposite. An argument by assertion really shouldn't decide
6 this issue. If there is a First Amendment issue here, which
7 there clearly at least potentially is, and the Court has
8 questions about it or feels the need to reach it, we ought to
9 have a hearing. We ought to find out what expectations are
10 for purposes of the Fourth Amendment. We ought to find out
11 about chilling effect for purposes of the First Amendment. We
12 ought to find out about the Government's need for purposes of
13 the First Amendment balancing. And so on.

14 They can't simply say, no chilling effect, not
15 overbroad, we're not seeking affinity information, and so on.
16 We're not affecting rights of association.

17 So, unless the Court has questions --

18 THE COURT: No, thank you.

19 MR. KEKER: -- that's it. Thank you, ma'am.

20 THE COURT: Did you have anything to add, Mr. Fine?

21 MR. FINE: Yes, Your Honor, briefly.

22 I just want to reiterate that there are two
23 different types of documents that we're seeking to unseal
24 here. There are judicial orders and there are the
25 applications and any related affidavits.

1 With respect to the other judicial orders to other
2 companies, the Government has failed to explain either in
3 their papers or here today why it is in the best interests of
4 the investigation to reveal the order to Twitter, but that
5 they can't reveal the orders to other companies. They haven't
6 explained why and they can't explain why. There is simply no
7 difference.

8 The only potential risk that there could be to
9 unsealing the other orders would be that the public would know
10 who else has received these orders. But that's simply not a
11 justification for maintaining secrecy. We have a presumption
12 of open access for a reason. And just because the public
13 doesn't know certain things is not a sufficient reason.

14 At a minimum, if the Court believes that there is
15 some concern about exposing those third parties, there is a
16 simple solution. The Court can unseal those other orders and
17 simply redact the company names. We don't think that's
18 necessary, but that's a clear, less restrictive alternative
19 that the Fourth Circuit has made clear that this Court must
20 adopt if it's present.

21 Second, we're not asking for a right to personal
22 notice of all judicial orders or all applications and
23 affidavits that the Government submits to the Court.

24 What the common law and the First Amendment require
25 is that there be public notice of all judicial records. And

1 that hasn't occurred here, Your Honor. And that's not
2 permissible.

3 There simply is not a public docket for each 2703
4 order that the Government has obtained. There may or may not
5 be notice now of the Twitter order itself, but leave that
6 order aside. We have got to focus in on all of the other
7 orders. There is simply no public docket of those other
8 orders. And the Fourth Circuit has made crystal clear that
9 once matters are sealed, even in time sensitive, otherwise
10 secret proceedings, there has got to be public dockets so that
11 individuals have the right to, so that the public has a right
12 to notice and an opportunity to challenge those sealing
13 orders. That hasn't happened here and it has to happen.

14 Third, Your Honor, with respect to the affidavits,
15 there are the applications themselves. The Government has to
16 provide a specific justification to show why in these facts
17 and in these circumstances this particular investigation will
18 be compromised or jeopardized.

19 It is not enough to simply say, the other side
20 doesn't know this information and, therefore, revealing it to
21 them will damage our investigation.

22 Essentially what they're saying is, it will be
23 harmful to our case if the other side knows information. But
24 that's not how our system works. You don't get to keep
25 information secret and hidden from the other side just because

1 you don't want to reveal it to them.

2 They have got to provide a specific reason why
3 revealing those facts merits secrecy. They have got to show,
4 it's going to tip off witnesses, they are going to flee if
5 they know about this information. That's not present here.
6 The Twitter order has already been unsealed. So, any of that
7 risk would have already occurred.

8 They have got to show that evidence is going to be
9 destroyed. Again, they haven't made that argument and they
10 can't make that argument here.

11 With respect to the Media General case that the
12 Government cites, Your Honor, that case is very, very
13 different from this case. In that case--

14 THE COURT: I remember it.

15 MR. FINE: I am sure you do, Your Honor. I am
16 referring to it by Media General. In that case everything was
17 publicly available except for the Government's affidavit.

18 Here the Government wants to keep orders secret.
19 That's a very different case, Your Honor.

20 In addition, there was public docketing in that case
21 of every single sealing order. And thanks to the Court, the
22 Clerk's Office made sure that there was public docketing of
23 everything there, including the sealing order.

24 Here, again, all the other orders to other companies
25 have not been docketed, and that's simply not permissible.

1 And, Your Honor, the Government essentially argues
2 that this is just a routine case and that nothing new is going
3 on here, nothing important is going on here, but this is
4 anything but a routine case.

5 The case law makes clear there is a clear
6 presumption of open access to all judicial documents. And for
7 the Government to overcome that heavy burden, they have got to
8 show that their interests heavily outweigh the public's
9 interest and movants' interest. And it's not enough just to
10 assert this general desire to keep information secret and
11 hidden from the other side.

12 They haven't met their specific showing here in
13 these specific facts. And, therefore, the clear presumption
14 of access should win out and all these documents, both the
15 other orders and the affidavits and applications, should be
16 unsealed, Your Honor. And at a minimum, they all need to be
17 publicly docketed.

18 THE COURT: All right, thank you very much.

19 MR. FINE: Thank you.

20 THE COURT: Mr. Cummings, they touched on your
21 brief. Did you need to add any argument? The Government did.

22 MR. CUMMINGS: No, I think it is sufficiently stated
23 in there, Your Honor. Thank you.

24 THE COURT: Okay. All right, thank you.

25 Well, everyone did an excellent job in argument, I

1 really appreciate it. I am going to take it under
2 consideration and issue an opinion.

3 Thank you.

4 MR. KEKER: Thank you, Your Honor.

5 NOTE: The hearing concluded at 11:42 a.m.

6 -----

7
8 C E R T I F I C A T E o f T R A N S C R I P T I O N

9
10 I hereby certify that the foregoing is a true and
11 accurate transcript that was typed by me from the recording
12 provided by the court. Any errors or omissions are due to the
13 inability of the undersigned to hear or understand said
14 recording.

15
16 Further, that I am neither counsel for, related to,
17 nor employed by any of the parties to the above-styled action,
18 and that I am not financially or otherwise interested in the
19 outcome of the above-styled action.

20
21
22
23 /s/ Norman B. Linnell

24 Norman B. Linnell

25 Court Reporter - USDC/EDVA